Daka, Inc. *and* International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Local 376, UAW, AFL–CIO. Case 34–CA–5424

January 27, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On September 14, 1992, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed exceptions and a brief in support and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire 11 employees of the predecessor employer because they had been represented by the Union, and by discharging 5 other employees because they engaged in an unfair labor practice strike. He further found that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union. Finally, he found that the Respondent violated Section 8(a)(1) by telling employees that it was aware of their planned strike activities and by threatening them with discharge if they went out on strike. No exceptions were taken to these findings.

In his recommended remedy, the judge found that because the Respondent had ceased doing business at the East Lyme Public Schools, it would be meaningless to require it to bargain with the Union over a collective-bargaining agreement. No exceptions were filed to that part of the recommended remedy, and we adopt it. He also recommended that reinstatement for the 16 discriminatees not be ordered unless the Respondent resumed the same or substantially the same operations (i.e., food service operations) at the East Lyme Public Schools. He further recommended that backpay for these individuals continue only until the date that the Respondent ceased its operations at the East Lyme Public Schools.

The General Counsel asserts that the judge departed from the traditional remedy for 8(a)(3) violations as are present here, which would generally require that the Respondent offer immediate reinstatement to the discriminatees, and that backpay continue to run until the time that the Respondent has made proper offers of reinstatement. The General Counsel notes evidence that the Respondent has other food operations and contends that any reasons for not requiring the discriminatees' reinstatement to those operations would be appropriately addressed at a backpay hearing during the compliance stage. We agree with the General Counsel and we shall modify the remedy insofar as it, at present, limits the Respondent's reinstatement and backpay liability.

In *Williams Motor Transfer*, 284 NLRB 1496 (1987), the Board considered a similar situation. The respondent ceased part of its operations after having terminated employee LaRose in violation of Section 8(a)(3) of the Act. There, the General Counsel contended that the judge erred in failing to provide for LaRose's reinstatement, because the respondent had other operations that continued to function, to which it might be appropriate to order his reinstatement. The Board agreed and ordered reinstatement and backpay for LaRose, leaving to the compliance stage those unresolved matters that would affect his reinstatement rights or the appropriate scope of the backpay period.[1]

The same principles are applicable here. The record before us strongly suggests that the Respondent has other food service operations in the region and beyond. Further, the General Counsel notes that the employment fate of the employees still working for the Respondent when it ceased its operations at the East Lyme Public Schools may have a bearing on the Respondent's backpay and reinstatement liability to the discriminatees. We find that the General Counsel should be afforded an opportunity to explore all these matters at compliance. To hold otherwise would allow the Respondent to benefit from its unlawful conduct and also deprive the discriminatees of their full remedy under the Act. Accordingly, we will order that the discriminatees be offered immediate reinstatement and backpay, leaving to the compliance proceedings all unresolved matters that may affect their reinstatement rights and the scope of the backpay period.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Daka, Inc., Wakefield, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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[1] 284 NLRB at 1497. See also *Cerro CATV Devices*, 237 NLRB 1153, 1157 (1978), in which the respondent was ordered to offer the discriminatee reinstatement to a position in its New Jersey facility (displacing another employee, if necessary), after the Alabama facility in which the discriminatee had worked was shut down. The Respondent's reliance on *Eltec Corp.*, 286 NLRB 890, 897 (1987), in which the backpay period for 24 laid-off employees was tolled as of the date the respondent ceased operations, is misplaced, because in that case there was no finding of discriminatory discharge or refusal to hire, as here.

[2] See *Dean General Contractors*, 285 NLRB 573 (1987).

1. Substitute the following for paragraph 2(a).

''(a) Offer immediate and full reinstatement to Sylvia Concetta Austin, Arlene M. Banks, Doris C. Downey, Anne E. Finnegan, Antoinette M. Kohl, Mary Francis Levanti, Ethel Long, Dianna L. Risch, Jeanne M. Stadnicki, Eleanor M. Yuhas, Louise A. Hall, and also to Gail Bohn, Annette Parke, Helen Provost, JoAnn Provost, and Bernice Sullivan, to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).''

2. Delete paragraph 2(b) and reletter the remaining paragraphs.

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain collectively with International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Local 376, UAW, AFL–CIO, as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time cooks and cafeteria workers employed by us at East Lyme High School, East Lyme Junior High School, Lillie B. Haynes School and Flanders Elementary School, East Lyme, Connecticut, and at the Niantic Center School, Niantic, Connecticut; but excluding all other employees, office secretaries and clerical employees, confidential employees, casual employees, student helpers and all guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT make changes unilaterally in the terms and conditions of employment of our employees without notice to and bargaining with the Union.

WE WILL NOT refuse to hire employees for our East Lyme Public School operation because they were represented by International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Local 376, UAW, AFL–CIO, or in order to avoid a bargaining obligation with that Union.

WE WILL NOT discharge employees because they engaged in an unfair labor practice strike.

WE WILL NOT tell employees that we were aware of their planned strike activities.

WE WILL NOT tell employees that if they engaged in a strike they would no longer have jobs.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer to the following individuals immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, less any net interim earnings, plus interest:

Jeanne M. Stadnicki	Sylvia Concetta Austin
Arlene M. Banks	Eleanor M. Yuhas
Doris C. Downey	Louise A. Hall
Anne E. Finnegan	Gail Bohn
Antoinette M. Kohl	Annette Parke
Helen Provost	Mary Francis Levanti
Ethel Long	JoAnn Provost
Dianna L. Risch	Bernice Sullivan

WE WILL notify each of the above employees that we have removed from our files any reference to their refusal to be hired, or their discharge, and that the refusal to hire, and the discharge will not be used against them in any way.

WE WILL, on the resumption of our operations at the East Lyme Public Schools, recognize and bargain collectively with International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Local 376, UAW, AFL–CIO, as the exclusive collective–bargaining representative of our employees in the appropriate unit set forth above.

DAKA, INC.

Craig L. Cohen, Esq., for the General Counsel.
John Coyne, Esq. (Coyne & Gottlieb, Esqs.), of Boston, Massachusetts, for the Respondent.
Thomas W. Meiklejohn, Esq. (Gould, Livingston, Adler & Pulda, Esqs.), of Hartford, Connecticut, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to a charge and a first amended charge filed on September 26 and October 30. 1991, respectively, by International Union, United Automobile, Aerospace, and Agricultural Implement

Workers of America, Local 376, UAW, AFL–CIO (Union), a complaint, amended at the hearing, was issued on November 7, 1991, by Region 34 of the National Labor Relations Board against Daka, Inc. (Respondent).

General Counsel's theory is essentially that upon taking over the operation of a school lunch program in the East Lyme, Connecticut Public Schools, Respondent would have become a successor to Marriott Corporation, which had previously operated that program, but for Respondent's unlawful failure to hire a majority of the former Marriott employees. According to General Counsel's argument, Respondent sought to avoid a successor's bargaining obligation with the Union which had represented the Marriott employees. General Counsel argues that, but for its failure to hire a majority of the Marriott employees, Respondent would have been obligated to bargain with the Union, and assuming such a finding is made, that Respondent unilaterally established terms and conditions of employment without consulting the Union.

The complaint also alleges that Respondent discharged 5 former Marriott employees which it did hire, and alternatively argues that if those employees were not, in fact discharged, they engaged in a strike in protest of the Respondent's failure to hire the 11 former employees of Marriott.

Finally, the complaint alleges that Respondent (a) created an impression of surveillance, (b) threatened employees with termination if they engaged in union and protected concerted activities, and (c) interrogated employees concerning their union and protected concerted activities.

Respondent's answer to the complaint denied the material allegations thereof, and on April 6 and 7, 1992, a hearing was held before me in Hartford, Connecticut.

Prior to the opening of the hearing, a hearing was held in U.S. district court on the Regional Director's request for a 10(j) injunction. General Counsel advises in his brief that Judge Dorsey denied the requested relief on the ground that Respondent had ceased operations at the East Lyme Public Schools.

Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Massachusetts corporation. having an office and place of business in Wakefield, Massachusetts, and with places of business located at various schools in Connecticut, has been engaged in the business of customers. Annually, Respondent provided services valued in excess of $50,000 for various enterprises located in states other than Massachusetts. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Facts

A. *Background*

The East Lyme Connecticut Public Schools maintains five cafeterias in its school system. Prior to 1984, the East Lyme Public Schools (ELPS) operated the cafeterias by employing employees to work therein. In 1984, the LPS contracted with Service Systems, a private company, to operate the cafeterias. Service Systems was succeeded in 1985 by Marriott Educational and Health Services, Inc. (Marriott), which operated the cafeterias until about August 1990 .

In October 1988, during Marriott's operation of the cafeterias, the Union was certified by the Board. It was stipulated that the appropriate collective-bargaining unit involved herein is as follows:

> All full-time and regular part-time cooks and cafeteria workers employed by the Respondent at East Lyme High School, East Lyme Junior High School, Lillie B. Haynes School and Flanders Elementary School, East Lyme, Connecticut, and at the Niantic Center School, Niantic, Connecticut but excluding all other employees, office secretaries and clerical employees, confidential employees, casual employees, student helpers and all guards, professional employees, and supervisors as defined in the Act.

Following its certification, the Union and Marriott bargained for an initial collective-bargaining agreement. Having been unable to reach an agreement by the summer of 1990. Marriott Was informed by ELPS that unless a signed contract between Marriott and the Union was entered into by the start of the September 1990 school year, Marriott would not be permitted to operate the cafeterias that year.

The parties were unable to reach agreement upon the terms of a new contract and, accordingly, no food service contractor operated the cafeterias that school year, and Marriott's employees were informed that they were not to report to work.

In October 1990, the employees who were formerly employed by Marriott commenced picketing at the schools and at the ELPS office with pickets signs which read ''Bring Back Hot Lunch.''

Thereafter, an unfair labor practice charge was filed against Marriott, and in partial settlement of the charge, in January 1991, a collective-bargaining agreement was executed between Marriott and the Union. That agreement had no effect on the operation of the cafeterias, since there was no food service contractor operating the cafeterias during that school year which ran front September 1990 to June 1991. Accordingly, the former Marriott employees continued to picket with the same signs.

B. *Respondent Becomes the Contractor*

In late June 1991, unit employee and shop steward Anne Finnegan read a newspaper article which stated that Respondent had been awarded a contract by the ELPS to oper-

ate the cafeterias, beginning in September 1991. As a result, on July 2, 18 unit employees traveled to Respondent's Wakefield, Massachusetts headquarters to file applications for employment.

The employees were met by Margaret Benard, the director of human resources for Daka International. She was told that the visitors were the former employees who were employed at the East Lyme Public Schools, who wished to fill out applications. Benard told them that applications are not normally received at headquarters, but nevertheless gave them applications, which they completed. Benard also told them that the person who would be doing the hiring was the Respondent's director who would be appointed to service the East Lyme contract, and that normally Respondent hires the same employees who had been employed at the contracted location before. However, Benard noted that no director had been appointed as of that time.

While they completed the applications, Finnegan told Benard that the employees were represented by a union. Benard responded that that fact did not matter because Respondent had other union accounts. Benard also assured them that she would forward the applications to the appropriate persons, and that they would contact the applicants.

On August 11, an advertisement appeared in a local newspaper, which stated that Respondent was hiring cafeteria employees for the ELPS.

The following day, August 12, 18 unit employees appeared at the East Lyme High School, where they met William Burnette, an official of Respondent. Finnegan told Burnette that they were the employees who were formerly employed at ELPS, and that they had completed applications at Wakefield. At first, Burnette denied having the applications, but then located them. He read the names of the employees, all of whose applications he had. Burnette told the workers that he was there simply to take applications, not to interview anyone, and that a director would be hired, who would contact them.

Later that day, two other employees, Gail Bohn and Louise Hall, visited the high school and completed applications. They did not go to Wakefield in July.

Also, on August 12, the Union requested Respondent to recognize it and bargain collectively as the representative of the unit employees. Respondent has refused to do so.

During the summer, the picketing continued at the ELPS headquarters.

On August 26, 1991, George Sottile was hired by Respondent as its food service director for the ELPS. Sottile was faced with the need to hire unit employees and have them in place in 2 days. He was given about 50 applications, including those completed by 20 who were former Marriott employees. He interviewed 30 to 35 applicants. Sottile called, interviewed, and hired 9 former Marriott employees, but did not contact the other 11 former Marriott employees.

It was stipulated that those 11 former Marriott employees were, during this period of time, ready, willing, and able to accept employment by Respondent if it was offered. However, they were not contacted by Respondent.

The new school year began on September 3, 1991. Of the 24 employees of Daka, 9 comprised former Marriott employees. The picketing continued to take place, being conducted by the 11 former Marriott employees who were not hired. On September 23, all 20 former Marriott employees met at an employee's house, and heard from the 9 of their number who were employed by Daka that they were being overworked, that substitutes were not being hired when a worker was absent, and were asked to do jobs, in addition to their regular work, that the new workers, those who had not been employed by Marriott, were unable to do. They were also generally unhappy with their work situation. All nine then voted to strike on September 25, and join the picket line in support of their coemployees who were not hired. They also agreed not to tell anyone of their plan to strike, in order to maximize the impact of their walking out, so as to induce Respondent to settle the matter quickly by rehiring their coemployees.

The following day, September 24, Sottile spoke separately and privately to each of the nine unit employees at the cafeterias where they worked. The conversations with Helen Provost, JoAnne Provost, and Annette Parke, were similar.[1] Sottile told them that he knew what was ''going on'' regarding the employees' planned ''walk-out'' the next day. Sottile told them that anyone who did not work the following day would not have a job, adding that if they came to work they would still have a job. Sottile asked each of them what they intended to do. They all said they would have to think about it. Sottile's conversation with Gail Bohn was essentially the same as with the other three workers, however, Sottile did not tell her that if she did not come in the next day she would not have a job. Only JoAnne Provost testified that Sottile told her the source of his knowledge. She stated that Sottile told her that the Union advised him of the walkout. However, Provost was later told that the Union denied telling Respondent about the walkout. All were surprised that Sottile knew of the impending walkout.

Sottile essentially testified to the conversations set forth above, but stated that he did not think that he told the employees that if they engaged in the walkout they would not have a position. However, he testified that that was ''understood.'' Sottile stated that he was told of the walkout by a principal of a school.

On September 25, only five of the nine employees who had voted to strike, actually did so. The other four remained at work. The five, Bohn, Parke, Helen Provost, JoAnne Provost, and Denise Sullivan spoke with Sottile before the start of the schoolday. JoAnne Provost, acting as spokesperson, told him that they would not return to work until all the former Marriott employees were hired and recognized as a unit. Provost added that this issue was a ''battle'' for those inside as well as those outside on the picket line, and was a matter of ''conscience.'' The five workers then left and began to picket. JoAnne Provost stated that she walked out that day in protest of the failure to rehire her 11 former coworkers, and in support of them.

Sottile testified that he concluded that the five employees who refused to come to work on September 25 had quit, and that following their quit he terminated them by noting in their personnel files that they were terminated. Thereafter, following 3 days of absence, during which time he saw them picketing. Respondent's manager, Kenneth Breeman, marked their files as being ineligible for reinstatement because they were absent for 3 days.

[1] Helen Provost told Sottile that she would remain on the job if she received medical insurance.

On September 26, the instant original charge was filed, and the picket signs were changed to read that the picketing was being conducted in support of the Union in behalf of those not rehired. The picketing has continued to date.

The contract between the ELPS and Daka had not been renewed for the school year which began in September 1991.

Respondent's Decision-Making Process Regarding Hiring

As set forth above, George Sottile was hired as the food service director for the ELPS on August 26, 1991. He had sole authority to hire employees, and he needed to hire 24 workers within 2 days for a banquet to be held at the high school. He was given about 50 applications, which included all the former Marriott employees who had been employed at the ELPS. He was given no instructions or directions as to numbers of former Marriott employees to hire, or who, specifically to hire or not hire. Sottile interviewed 30 to 35 applicants.

Prior to his review of the applications, Sottile was aware that the ELP had a problem with the Union, which included picketing. and which problem, was ''ongoing.''

Sottile conceded that given the time restraints imposed upon him to hire, that it would have been easier to consider the 11 former Marriott employees, but that Respondent had ''other plans'' for the operation.

In its request for proposal for a new food service contractor, the ELPS made no reference at all to the hire of the former marriott employees, unlike certain other school districts which require or request that the new contractor hire the employees who were formerly employed there. Accordingly, Sottile believed that Respondent had a ''free hand'' in hiring employees to begin a new program at the ELPS.

Of the nine former Marriott employees hired, Sottile hired four of the five head cooks who had been employed by Marriott. He stated that he needed to retain those key employees, since they had experience in the ELPS, were familiar with the kitchens, and he needed their skills, and also because of the recommendations received in their behalf. As to the other, nonhead-cook positions, Sottile sought people having retail experience. Nevertheless, five former Marriott employees were hired for those positions. Those positions comprised four food preparation employees and cashiers, and one assistant cook-baker.

Sottile testified that, in making decisions concerning hiring, he considered the fact that there had been no school lunch program in the ELPS for 1 year, and that Respondent was looking for a new program, one which should include ''new blood,'' much work regarding new products, changes, and a lot of excitement, to induce the students back into the school lunch program, after having been ''brown-bagging'' for 1 year.

Respondent sought to hire employees with retail experience; workers who could relate well to customers. Sottile defined ''retail experience'' as those employees who had experience providing a product or service to customers in exchange for money.

Sottile screened all the applications by looking at the prior experience of the applicants with a view toward hiring the ''type'' of people Respondent was looking for. He sought employees who could market themselves and who could be trained in Respondent's marketing skills. For example, employees would have to participate in the Respondent's programs by having contact with the students: reminding them that there were stickers on the back of their trays, and to put their names on raffle tickets; and the cashiers or servers would have to make sure that the children take the proper items to ensure that the ELPS receives credit for a reimbursable lunch.

In this regard, Sottile did not know anything about Marriott's prior food service program. Nor did he know the customer service involvement, if any, of the 11 former Marriott employees who he excluded from consideration. Rather, Sottile explained that Respondent sought to put in place a new program with new employees who were excited about what they were doing. He had no reason to believe that the 11 did not possess the qualifications he sought, nor did he have any reason to believe that they did possess those qualifications since he had not received any recommendations for them.

Sottile's decisions to hire were based on job experience and past work history of the applicant, and on his own observations, feelings, and findings obtained when he spoke to the applicants who he interviewed, and after checking their references.

In making hiring decisions, Sottile looked at the overall picture of the employee, with a view toward how they would relate to customers; how they dressed; how they came across in an interview; how they spoke with him; their communication skills; whether he believed they could be trained. His bottom line was whether he believed that they would relate well to customers. He based his evaluation on whether they were good with people on their interview and the results of the reference calls he made, to see how they related to customers in their prior positions. Sottile conceded that he could have asked the school principals for their opinions as to the 11 employees not hired, but did not do so, explaining that the startup period was very busy.

Sottile stated that the 11 former Marriott employees were never in the pool of applicants within his consideration for employment because he never spoke to them. He stated that the other employees he hired, who were not former Marriott employees, were more qualified. He further stated that it was not necessarily true that the 11 had all the experience and qualifications he sought.

Sottile explained his reason in not interviewing some of the 11 former Marriott employees. He stated that he believed that there was a need for ''new blood'' in the school lunch program, with a new program, with new, exciting ideas in order to persuade the students to return to, and participate in the school lunch program after its 1-year absence. with this new program, Respondent intended to institute promotions such as half price day; sticker days; raffles; giveaways, etc.

Sottile further explained that he decided that the 11 former Marriott employees who he did not interview did not have the type of customer experience sought, or that their experience was not sufficient to qualify for an interview, because the ELPS contract was sold as a new program, that there were many problems in the past year relating to the labor union difficulty, which problems were extant. Respondent's plan was to change the program by bringing new life and new blood into it. It intended to do new things and it needed new people.

Sottile first testified that in the 3 days in which he was conducting interviews in the school, he received positive unsolicited recommendations for all nine former Marriott employees he hired. However, he contradicted this testimony by later testifying that he received recommendations for only seven of the nine former Marriott employees he hired: the four head cooks. Helen and JoAnne Provost and Paullette Izzo. Sottile further stated that he did not receive recommendations for two former Marriott employees who he hired. However, he decided that they were qualified, as opposed to any of the 11 he did not choose, based on his observations of the way they conducted themselves during the interview. It should be recalled, that the other 11 were not called for interviews.

Sottile did not receive any recommendations for the 11 he did not hire, either positive or negative, nor did he ask the ELPS for its opinion of any of them.

Sottile stated that the fact that he received no positive recommendation for any of the 11 played a part in his decision-making process. He explained this by saying that he did not consider for employment the former Marriott employees who were not recommended. He believed that if the principals and administrators had taken the time to make recommendations concerning some of the employees, they should have recommended others if they believed that they warranted such recommendations.

In order to consider whether proper and equal consideration was given to the 11 former Marriott employees, it is important to look at the qualifications of the employees Respondent hired in their stead. In assessing their qualifications, one must keep in mind the experience sought by Respondent.

Gloria Bagley—was interviewed and hired on September 3, the first day of school. Sottile testified that notwithstanding that the applications of the 11 former Marriott employees had been pending since July 2, representing people who had done the same type of work that he sought to employ workers for, Sottile sought Bagley, who had never worked at ELPS. Bagley had been a substitute in a school lunch program, and she conducted herself very well in the interview.

Paula Baxter—hired as a food server, worked from 1980 to 1982 as a prep cook and salad maker. Since then, she had reception and sales experience. In his testimony in the 10(j) proceeding, Sottile conceded that Baxter's experience after 982 bore no relationship with the kind of work she would perform for Respondent.

Gail Bialowns—hired as a cashier, did typing and secretarial work at Electric Boat Co., and worked as a bank teller; which Sottile regarded as important experience to her position as a cashier. Sottile stated that there is much student contact as a cashier, inasmuch as the employee must remind students to select all the proper components of a reimbursable meal

Tammy Collette—hired as a cashier. She also set up food for 25 percent of her time. Collette worked for Dunkin' Donuts, where she had cashier experience. Sottile stated that he believed that her retail experience was more relevant for Respondent than a long-term, former Marriott employee.

Catherine Devlin—hired as a server, did office work for a newspaper. Although she had prior food experience, Sottile did not know that when he read the applications and contacted her for an interview. He testified that he hired Devlin instead of any of the 11 former Marriott employees who knew exactly what to do and had the past experience to do it.[2]

Mary Driscoll—hired as a cashier, had prior experience operating and managing a tavern and restaurant. One-third of her time was spent doing noncashiering work, and for that amount of time, according to Sottile, she was doing the kind of work the 11 former employees were qualified to do.

Sue Jones—hired as an assistant cook. Sottile testified that Jones admitted that she never had any experience doing this type of work, but she had some restaurant experience, although none in a cafeteria setting, serving food to children. She had prior experience for 2 years at Domino's Pizza, and jobs at a tavern where she worked as a cook and bartender for about 1 year, where she prepared fast food at the bar, consisting of some of the same items served in the ELPS, such as burgers. She therefore had experience with the most popular items served—pizza, burgers, and fries.

Cheryl Karg—hired as a server, had experience as an x-ray technician. Sottile conceded that her application listed no relevant experience for the position he sought to fill. He further admitted that, nevertheless he chose to interview her rather than any of the 11 whose applications were ''clearly on point'' as having the exact experience he sought. In his testimony in the 10(j) proceeding, when questioned by the judge, Sottile agreed that it would be a fair inference to suggest that he had some ''ulterior motivation'' in not talking to experienced people who had paper qualifications superior to the person he interviewed and hired, such as Karg.

Joyce Lentz—offered a position as a cook on September 26, following the walkout of the five employees the day before. She had extensive experience as a cook, and Sottile received a positive recommendation from an employee of Respondent.

Marcia Marchand—hired as a cashier, worked in a flower store, supermarket, and as a deli clerk. She had cashier and food handling experience.

Alberta Paradesis—hired as a server and cashier, worked for Toys-R-Us, PIP Printing, and New England Telephone.

Dawn Pressman—hired as a server, had experience working for a newspaper, and also assembling tachometers. She also worked, from 1981 to 1984 as an assistant to a pharmacist. Sottile regarded her customer experience as important. Sottile conceded that he was not certain as to why he decided to interview Pressman, as opposed to someone who had worked for ELPS for 18 years, but he believed that the reason was that he needed new people and new faces for a new program.

Dawn Shay—hired as a prep-cook person, worked as a cocktail waitress in a bar, and for 8 months as a food waitress. Although Sottile conceded that Shay had no qualifications or past experience for the type of work she was hired to perform—serving food to children in a cafeteria setting—nevertheless she had other restaurant experience, which he deemed important. Thus, she had experience dealing with customers. Respondent's philosophy was that the school children were to be treated as customers who had discretion as to whether or not to buy Respondent's product, and its employees were expected to ''sell'' the product.

[2] Sottile also testified that it was not necessarily true that the application of the 11 employees not considered had all the experience and qualifications he sought.

Analysis and Discussion

A. *The Alleged Violations of Section 8(a)(1) of the Act*

The complaint alleges that Respondent violated Section 8(a)(1) in several respects by virtue of Sottile's conversation with employees on September 24, 1991.

On that day, Sottile spoke with nine former employees of Marriott who were then employed by Respondent, concerning his information that they intended to engage in a strike the following day. According to the credited testimony of the employees who testified regarding this conversation, Sottile told them that he knew ''what was going on,'' referring to their decision to strike. They had met the day before, with all the unit employees, at which the nine workers voted to strike. Sottile's statement created the impression of surveillance because he implied that he was aware of their meeting and activities in behalf of the Union. *Escada (USA), Inc*., 304 NLRB 845 (1991); *Spring City Knitting Co*., 285 NLRB 426, 427 fn. 4 (1987). The fact that Sottile may have become aware of the walkout through a school principal, as argued by Respondent, has no bearing on the impression he gave to employees, that he was aware of their planned walkout.

During the same conversation, Sottile asked employees whether they intended to participate in the planned strike. Those who testified said they had to think about it. Respondent argues that Sottile properly asked this question so that he could take preparations to staff the cafeterias with replacements in the event of a strike. Indeed, Sottile testified that the principal who made him aware of this event expressed concern about Respondent being able to continue operations. The complaint alleges that this inquiry constituted the unlawful interrogation of employees. Under these circumstances, particularly where the four cooks, who were the key employees of Respondent, could be expected to leave without notice, I believe that Sottile had a legitimate purpose in questioning the nine employees as to whether they intended to strike the following day. I accordingly will recommend dismissal of this allegation of the complaint.

In the same conversation, according to the credited testimony of the employees, Sottile told them that if they did not come in the following day, they would no longer have a job. I find that this threat of discharge violated Section 8(a)(1) of the Act. *Hotel Roanoke*, 293 NLRB 182, 189 (1989).

B. *The Alleged Violations of Section 8(a)(3) of the Act*

1. The failure to hire the 11 former Marriott employees

General Counsel argues that Respondent embarked on a plan to refuse to hire, for its ELPS operation, a sufficient number of the former employees of Marriott so that its work force would not be comprised of a majority of such former workers. General Counsel further argues that Respondent's motivation in not hiring the 11 former Marriott employees was to evade an obligation to bargain with the Union, as a successor to Marriott.

Respondent denies that it failed to hire the 11 employees because of any improper motivation, and asserts that proper business considerations resulted in the hire of other employees who were not formerly employed by Marriott at the ELPS.

A new owner of an operation is not obligated to hire any of its predecessor's employees, but may not refuse to hire the predecessor's workers solely because they were represented by a union or to avoid having to recognize a union. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Howard Johnson's v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974).

> The Board has held that the following factors are among those that establish that a new owner has violated Section 8(a)(3) in refusing to hire employees of the predecessor: substantial evidence of union animus;lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine. *U.S. Marine Corp*., 293 NLRB 669, 670 (1989).

Here, unlike the typical case, there is no evidence of overt union animus. No statements were made to employees in which Respondent made it known that it sought to avoid recognizing the Union by limiting the number of Marriott's employees it would hire. Sottile testified that he was given no quota of such employees to hire, and had no discussion with his superiors concerning union avoidance through careful hiring. In fact, employee witnesses testified that Respondent's official Benard told them, when they submitted their applications in Wakefield, that the fact that the were ''union'' had no bearing since Respondent had union accounts. Sottile testified that although he was aware of the fact that there was no food service operation at the ELPS because of a union problem, such factors did not enter into his decision-making.

Although there may be no evidence of overt statements of union animus, General Counsel argues that the hiring of employees for the ELPS, in practice, provides a showing of animus, and establishes the motivation which caused Respondent to refuse to hire a majority of Marriott's former five employees. *Houston Distribution Service*, 227 NLRB 960 (1977).

Respondent was not required to employ any of the former Marriott employees, or hire a sufficient number of such employees so that its work force would be comprised of a majority of its predecessor's employees, as long as it did not act unlawfully.

> [Respondent] was only required to consider and select [the former Marriott] employees on the same lawful basis utilized with respect to others it considered and either selected or rejected. *Daka, Inc*., 286 NLRB 548, 559 (1987).

In other words, were ''all applicants for employment . . . judged by the same standard, with the failure to hire the alleged discriminatees reflecting no more than equal application of this standard?'' *Houston Distribution*, supra at 966.

Respondent had the applications of 18 of the former Marriott employees in its possession since July 2. Advertisements were placed in a local newspaper about 6 weeks later for positions to fill the ELPS cafeteria Jobs. Sottile read all of the approximately 50 applications received—20 from the former

Marriott employees, and about 30 other applicants who applied pursuant to the advertisement.

Based on Sottile's reading of all the applications, he made a preliminary decision to exclude from consideration for positions, 11 of the former Marriott employees. Yet he decided to include for consideration nine such employees. Four were cooks, who he needed because they were familiar with the operation and they occupied key positions. Nevertheless, he did not consider the 11 employees, notwithstanding that they too were familiar with the operation. Rather, he considered only those who he interviewed, and he excluded the 11 from interview.

Hiring decisions were made based on the applicant's experience, particularly retail work, and their appearance and conduct during the interview. Sottile also expressed a need for new faces since this was a new program. However, a review of the qualifications of those he did hire establishes that their qualifications did not fit those sought by Sottile. Thus, at the time that he screened all the applications, and selected those for interview, he chose for interview Catherine Devlin, whose application listed only office work. Similarly, he interviewed and hired Cheryl Karg as a server, whose sole work experience was as an x-ray technician.

Sottile stated that his bottom line in deciding whether to hire an individual was whether they were good with people. He stated that he based his evaluation on whether they were good with people on their interview, and his calls of their references.

Other reasons for excluding the 11 from consideration were that Sottile received favorable recommendations for certain former Marriott employees he hired, but received no recommendations, but no negative comment, about the others. However, the record indicates that of the nine former Marriott employees he hired, he received recommendations for only seven of them. Nevertheless, he hired two others without receiving recommendations. He decided that those two were qualified based on his interviews with them.[3] However, the other 11 were not contacted or given an opportunity to impress him with their qualifications, upon interview. No explanation was given as to why he hired only nine of the former Marriott employees, and not more, given that two were interviewed without recommendations received regarding their past performance.

Sottile stated that he could have contacted ELPS authorities for their comments about the 11 employees but chose not to do so because the startup time was very hectic. However, he conceded that it would have been ''easier'' to simply hire all the former Marriott employees, yet he did not do so. This is instructive, especially considering his testimony that the 11 applicants possessed the qualities he sought and had the experience to perform the jobs that he interviewed others for.

Emphasis must be placed on the qualifications of the persons hired as compared to the 11 refused consideration. Sottile sought a new face, a new person, with the ability to relate to people, and as to those, he stated that they could be trained in Respondent's method of operation. However, no consideration was given to the 11 former Marriott employees who had worked in the ELPS for as long as 13 years, in the case of Anne Finnegan, who also could have been trained. Sottile regarded it as important that the cooks be retained because they were familiar with the operation. They, apparently, did not have to relate well to people because they were in the kitchen, cooking. Presumably, the same emphasis on familiarity with the operation did not apply to the servers or cashiers since their importance to Respondent lay in their ability to relate well to the customer. However, no consideration, by way of interview, was given to the former Marriott employees. Sottile conceded that they had the qualifications and knew what to do in their jobs. The 11 employees ''provided a willing and available source of manpower, which could serve Respondent's immediate need for qualified [employees] with little adjustment and training.'' *Houston Distribution Services*, 227 NLRB 960, 966 (1977). See *El Mundo Corp*., 301 NLRB 351 (1991). ''Despite the presence of a pool of experienced workers, respondent went to considerable length to replace the union employees with entirely new workers—most of whom had no previous experience on pipeline operations.'' *NLRB v. Foodway of El Paso*, 496 F.2d 117 (5th Cir. 1974).

Thus, rather than interview and consider the 11 former Marriott employees, which concededly would have been easier in view of the time constraints, Respondent refused to consider them for interview, while at the same time, placing an advertisement in the local newspaper, and considering the applications of those responding to the advertisement, as to whom it could not be certain it would obtain people who possessed the qualifications and trainability it sought. *Houston Distribution*, supra at 966–967.

The evidence establishes that Respondent embarked on a plan to hire only a sufficient number of the former Marriott employees to constitute a minority of its employees in order to avoid an obligation to bargain with the Union.

When viewed against the criterion required to be observed in making hiring decisions—to consider and select the former Marriott employees on the same lawful basis utilized with respect to others it considered and either selected or rejected—I must find that Respondent did not satisfy that standard. Nor do I find that Respondent equally applied its hiring standards. Thus, the 11 former Marriott employees who concededly had the paper qualifications to perform the jobs interviewed for, were not sought for interview. They were not given the opportunity to compete with the other applicants for interview, where the interview was very important in the hiring decision. Rather, others who had no job experience in retail service, or specifically with school children, were hired.

Accordingly, I find that the General Counsel has made a prima facie showing sufficient to support the inference that motivating factor for Respondent's failure to interview and hire the 11 former Marriott employees was its determination not to become obligated to bargain with the Union. *Wright Line*, 251 NLRB 1083 (1980).

I also find that Respondent has failed to carry its burden of proving that any of the 11 employees would not have been hired in the absence of their union activities. In this connection I note that its defenses, that it sought new people, especially with retail experience, is not established by the evidence. It selected for interview an employee whose application listed her experience as being an x-ray technician. In

[3] In this connection, Sottile contradicted himself by testifying that he received recommendations for all the former Marriott employees he hired, and later testifying, as above, that he hired two such employees without receiving recommendations concerning them.

addition, Respondent's defense was based on the fact that recommendations were received for the Marriott employees it did employ. However, two such employees were hired without recommendations being received.

2. The discharges of the strikers

Inasmuch as I have found that Respondent's failure to hire the 11 former Marriott employees violated Section 8(a)(3) and (1) of the Act, it therefore follows that the five employees' strike in protest of Respondent's failure to hire the 11 was an unfair labor practice strike. I find, based on the credited testimony of the employees, that the reason the 5 employees' struck on September 25 was to protest Respondent's refusal to hire the 11 employees unlawfully refused hire. I note that the employees also testified that they struck in order to protest their working conditions. However, even if part of their motivation in striking was to protest the unfair labor practices, the strike is an unfair labor practice strike. Accordingly, I find that the September 25 strike was an unfair labor practice strike from its inception. *Harvard Industries*, 294 NLRB 1102, 1110 (1989), enfd. 921 F.2d 1275 (D.C. Cir. 1990).

I reject Respondent's argument that because the strike was allegedly designed to cripple Respondent's operations, it was thereby unprotected. The fact that the strikers told no one about ther plans to strike in order to maximize its impact and force the reinstatement of their colleagues does not, thereby, render the strike unlawful.

> The fact that the employees delayed going on strike until it would be most likely to have an adverse economic impact on Respondent is scarcely indicative that the unfair labor practices of Respondent were not the cause behind the decision to strike. [*Stephenson-Yost Steel*, 294 NLRB 395, 405 (1989).]

Respondent determined that the five employees who struck had quit, and that following their quit Respondent terminated them by noting in their personnel files that they were terminated. Thereafter, following 3 days of absence, Respondent's manager Kenneth Breeman marked their files as being ineligible for reinstatement because they were were absent for 3 days.

The five employees were not told that they were considered as quits who had been terminated due to their absence from work for 3 days. The question here is not what they knew at the time concerning their status, but rather what the intention and actions of Respondent was.

> The employees made the purpose of their action plain to Respondent and Respondent was not free to treat the walkoff as a ''quit.'' I find that the eight employees engaged in a strike . . . [r]espondent treated the strike as a quit and in so doing terminated the employees. As I have found that the employees did not themselves ''quit,'' such a termination was in fact a discharge by Respondent. Though Respondent did not notify the employees of the discharges until . . . the following day, the discharges had been in effect since [the prior day]. [*ABC Prestress & Concrete*, 201 NLRB 820, 825 (1973)].

Here, too, the five employees engaged in an unfair labor practice strike to protest the refusal of Respondent to hire their 11 coworkers. They did not quit their employment. Although they were not told that they were discharged, and did nothing to attempt to obtain their reemployment, nevertheless had they offered to return to work, such offers would have been refused on the ground that their personnel files were marked that they were terminated and ineligible for reinstatement. Accordingly, it would have been futile for them to offer to return to work.[4]

> The term ''discharge'' means that ''any offer to return to work [by the striking employees] . . . [would be] futile for purposes of achieving the full reinstatement to their former status to which they, as unfair labor practice strikers, were entitled.'' [*Matlock Truck Body*, 217 NLRB 346, 349 (1975).]

I accordingly find and conclude that Respondent's discharge of the five unfair labor practice strikers violated the Act. *Harvard Industries*, supra. They were deemed ineligible for reinstatement 3 days after they struck. Accordingly, I find that they were discharged as of September 25, the day they were treated as quits.

C. *The Alleged Violation of Section 8(a)(5) and (1) of the Act*

The complaint alleges, and Respondent denies, that Respondent is a successor to Marriott at the ELPS.

A successor employer is obligated to bargain with the labor organization which represented the predecessor's employees. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). In determining this question, the Board seeks to determine whether there is substantial continuity in the employing enterprise. A number of factors are examined, including whether the new company conducts essentially the same business as the predecessor.

Here, the physical plants remained the same when Marriott operated the food service operation at the ELPS, and when Respondent began its operation as the food service contractor.

Respondent's employees while employed at ELPS worked in the same kitchens, using the same trays, pots, pans, utensils, aprons, cash boxes, and cash registers as were used when the employees were employed by Marriott. There were some minor variations concerning the menu—Respondent provided two hot lunches, Marriott offered only one. There were also differences as to the receipts. Respondent required its cashiers to count the money they received. Marriott required its head cooks to count the money.

The four head cooks previously employed by Marriott were hired by Respondent in order to provide ''continuity'' because they were familiar with the operation.

Respondent argues that its task was to initiate a new program with vitality in order to win back customers who had no catered lunch service for the prior year. In keeping with that goal, Respondent's plan was to provide innovative programs and promotions in order to encourage the students to buy lunch from it. Respondent concedes that it was not aware of Marriott's programs while that company was the

[4] Of course, an offer to return to work by discharged strikers is unnecessary. *Abilities & Goodwill*, 241 NLRB 27 (1979).

ELPS contractor. Respondent further argues that the business philosophy of the two companies was different, in that Respondent is more concerned with treating the customer as a guest, and encouraging him to buy more products. I doubt that either the goals, as set forth above, or Respondent's business policy, differed that much from Marriott's goals or philosophy.

At bottom, Marriott and Respondent were food service companies, engaged in servicing a student population in the ELPS at the same locations with the same cooking devices, providing a similar menu with approximately the same number of employees.

In addition. Respondent argues that the 1-year hiatus in operations between Marriott's operation of the facilities and its taking over constitutes a substantial change sufficient to defeat a finding of successorship. I do not agree. There does not appear to have been any other substantial changes in operations. *Great Lakes Chemical Corp*., 298 NLRB 615 (1990). It should be noted that the entire Marriott work force applied for positions with Respondent.

Where the other required elements for finding successorship are present, as they are here, ''a new owner's failure to hire its predecessor's employees will not defeat a claim of successorship if such failure is shown to have been motivated by the former employees' union affiliation.'' *American Cleaning Co*., 291 NLRB 399, 406 (1988).

Applying these principles to the facts here, I find that Respondent is the successor employer to Marriott. I further find that, but for Respondent's unlawful refusal to hire possibly all, and certainly a majority of the employees of the predecessor, a majority of Respondent's employees would have been comprised of the former Marriott employees. I accordingly find and conclude that Respondent, as a successor employer, violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

Although the Union demanded recognition and bargaining on August 12, 1991, Respondent's obligation tn bargain did not commence until September 1, 1991. when it refused to hire the former Marriott employees.

Where a successor owner has illegally refused to hire the predecessor's employees, the new owner would be presumed to have retained substantially all of those employees and therefore would not be entitled to set initial terms of employment without first consulting the Union. *State Distributing Co.*, 282 NLRB 1048 (1987); *Harvard Industries*, supra at 1111.

According, inasmuch as I have found that Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily refusing to hire the bargaining unit employees employed by Marriott, I must therefore conclude that Respondent was not free to establish the initial terms and conditions of employment, but was obligated to first bargain with the Union about such changes. Since Respondent has not done so, it has violated Section 8(a)(5) and (1) of the Act. *Harvard Industries*, supra.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to hire the following employees for its East Lyme Public Schools operation on September 3, 1991, because they were represented by the union, and in order to avoid an obligation to bargain with the Union, the Respondent has violated Section 8(a)(3) and (1) of the Act: Sylvia Concetta Austin, Arlene M. Banks, Doris C. Downey, Anne E. Finnegan, Antoinette M. Kohl, Mary Francis Levanti, Ethel Long, Dianna L. Risch, Jeanne M. Stadnicki, Eleanor M. Yuhas, and Louise A. Hall.

4. By refusing to recognize and bargain with the Union on September 3, 1991, as the collective-bargaining representative of the employees in the unit described below, the Respondent has violated Section 8(a)(5) and () of the Act.

5. The strike which commenced on September 25, 1991, was an unfair labor practice strike caused by the unfair labor practices described above in paragraph 3.

6. By discharging the following employees on September 25, 1991, because they engaged in an unfair labor practice strike, Respondent violated Section 8(a)(3) and (1) of the Act: Gail Bohn, Annette Parke, Helen Provost, JoAnne Provost, and Bernice Sullivan.

7. By telling employees that it was aware of their planned strike activities, Respondent violated Section 8(a)(1) of the Act.

8. By telling employees that if they engaged in a strike they would no longer have jobs, Respondent violated Section 8(a)(1) of the Act.

9. By asking employees if they intended to strike, Respondent did not violate the Act.

10. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

11. The appropriate collective-bargaining unit consists of:

> All full-time and regular part-time cooks and cafeteria workers employed by the Respondent at East Lyme High School, East Lyme Junior High School, Lillie B. Haynes School and Flanders Elementary School, East Lyme, Connecticut, and at the Niantic Center School, Niantic, Connecticut; but excluding all other employees, office secretaries and clerical employees, confidential employees, casual employees, student helpers and all guards, professional employees, and supervisors as defined in the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the Act.

Inasmuch as Respondent has ceased doing business at the East Lyme Public Schools as of the end of the school year in June 1992, it would be meaningless to require it to bargain with the Union concerning an initial collective-bargaining agreement for employees who are not employed at that location. *Eltec Corp*., 286 NLRB 890, 897 (1987).

For the same reason, I will not order that immediate reinstatement be offered tn any of the employees set forth above. Those employees will not be entitled tn reinstatement unless Respondent resumes the same or substantially the same operations at the East Lyme Public Schools. *Williams Motor Transfer*, 284 NLRB 1496, 1497 (1987).

However, Respondent shall be ordered to make the employees whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and interest thereon shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Backpay for the 11 employees set forth above, shall be computed based on the start of Respondent's operations at ELPS on September 3, 1991, and shall continue until the cessation of Respondent's business at ELPS, less interim earnings. Backpay for the employees discharged on September 25, 1991, shall be computed from the date of their discharge and shall continue until the cessation of Respondent's business at ELPS, less interim earnings. The evidence received at the hearing concerning Bernice Sullivan's availability to work at the time of her discharge should be considered during the compliance stage of this proceeding.

Inasmuch as Respondent no longer maintains its operations at the last Lyme Public Schools, I shall recommend that it mail a copy of the notice which it is required to post, to each employee in the unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Daka, Inc., Wakefield, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Local 376, UAW, AFL–CIO, as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time cooks and cafeteria workers employed by the Respondent at East Lyme High School, East Lyme Junior High School, Lillie B. Haynes School and Flanders Elementary School, East Lyme, Connecticut, and at the Niantic Center School, Niantic, Connecticut; but excluding all other employees, office secretaries and clerical employees, confidential employees, casual employees, student helpers and all guards, professional employees, and supervisors as defined in the Act.

(b) Making changes unilaterally in the terms and conditions of employment of the employees in the above unit without notice to and bargaining with the above union.

(c) Refusing to hire employees for its East Lyme Public Schools operation because they were represented by International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Local 376, UAW, AFL–CIO, or in order to avoid a bargaining obligation with that Union.

(d) Discharging employees because they engaged in an unfair labor practice strike.

(e) Telling employees that it was aware of their planned strike activities.

(f) Telling employees that if they engaged in a strike they would no longer have jobs.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On the resumption of Respondent's operations at the East Lyme Public Schools, offer reinstatement to Sylvia Concetta Austin, Arlene M. Banks, Doris C. Downey, Anne E. Finnegan, Antoinette M. Kohl, Mary Francis Levanti, Ethel Long, Dianna L. Risch, Jeanne M. Stadnicki, Eleanor M. Yuhas, Louise A. Hall, and also to Gail Bohn, Annette Parke, Helen Provost, JoAnne Provost, and Bernice Sullivan.

(b) Make whole the employees set forth in subparagraph (a) above, for any loss of earnings they may have suffered, in the manner described in the remedy section of this decision.

(c) On the resumption of Respondent's operations at the East Lyme Public Schools, recognize and bargain collectively with International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Local 376, UAW, AFL–CIO, as the exclusive collective-bargaining representative of its employees in the appropriate unit set forth above.

(d) Remove from its files any reference to the unlawful refusal to hire employees, and the unlawful discharge of employees, and notify the employees in writing that this has been done and that the refusals to hire and the discharges will not be used against them in any way.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its office in Wakefield, Massachusetts, copies of the attached notice marked ''Appendix''[6] and mail copies to all employees of the Respondent in the East Lyme Public Schools unit. Copies of the notice on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the Date of this Order, what steps have been taken to comply.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall. as provided in Sec. 102.46 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''